

SENATE BILL REPORT

SB 5983

As of February 24, 2009

Title: An act relating to the scope of agency actions under the administrative procedure act.

Brief Description: Concerning the scope of agency actions under the administrative procedure act.

Sponsors: Senators Kline, Oemig and Pridemore.

Brief History:

Committee Activity: Judiciary: 2/24/09.

SENATE COMMITTEE ON JUDICIARY

Staff: Kim Johnson (786-7472)

Background: The Washington Administrative Procedure Act (APA) permits a party to obtain judicial review to challenge "agency action." Current law defines "agency action" as licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. However, "agency action" does not include an agency decision regarding "any sale, lease, contract, or other proprietary decision in the management of public lands." The term "proprietary" is not defined in statute.

In *Department of Natural Resources v. State Owned Forests*, the Washington Court of Appeals determined that, based on the phrase "or other proprietary decisions," a three-year extension of a forest resource plan developed by the Department of Natural Resources (DNR) was not "agency action" eligible for judicial review under the APA. The court considered proprietary to mean a "business-like venture as contrasted with a governmental function."

Summary of Bill: The Legislature declares its intent that in all future public land management planning decisions, the requirements of the APA will apply.

The clause "or other proprietary decision" is removed, therefore narrowing the public land management exemption for agency decisions under the APA to "any sale, lease, or contract decision in the management of public lands or real property interests."

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Appropriation: None.

Fiscal Note: Requested on February 23, 2009.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: We want to ensure that state government operates openly. The APA is one of our most cherished good government laws. "Other proprietary decision" includes everything the state does to plan for the management of state lands and ought to be subject to the APA. This bill simply closes a loophole and is a good housekeeping measure.

CON: This bill seeks to differentiate between proprietary decisions made by an agency by removing an exemption for only one type of proprietary decision. These decisions may already be appealed to a court via a constitutional writ or other statutory means like the State Environmental Protection Act (SEPA). DNR land management plans are reviewed under SEPA and these decisions may be challenged under SEPA. While we do not have a completed fiscal note yet, our early estimate is that the fiscal impact of this bill is at least one FTE and \$200,000/biennium.

I'm with American Forest Resource Council and we have a lot of questions about this bill. In all of our dealings with DNR, there are any number of public hearings available to testify and make your voice heard. There is no gap in the ability to take an issue up the legal food chain for review as the law is today. This change is not needed.

The point of the bill is to reverse a Court of Appeals decision. The real problem with the case was that the plaintiffs simply brought action under the wrong set of procedures. Also, to be clear, this bill does not only impact DNR. There are a number of state agencies that make proprietary decisions. The biggest category of these types of decisions are planning documents, reviewable under a constitutional writ, and other statutes depending on the type of planning that is taking place. Having proprietary decisions under the APA and the contract, sale, or lease not part of the APA will cause people to have to bring two separate actions instead of one, which is more confusing to the public than the current law.

Persons Testifying: PRO: Peter Goldman, Washington Forest Law Center.

CON: Leonard Young, DNR; Patricia O'Brien, Office of the Attorney General; Bob Dick, American Forest Resource Council.